

PROPOSED NEW RULE 7.3 (Formerly Rule 1-400 Advertising and Solicitation)

At its October 8, 2004 meeting, the Commission tentatively approved proposed new rule 7.3 (formerly rule 1-400). This proposal has not been considered or approved by the Board of Governors of the State Bar of California. Tentative approval means that the proposed new rule will not be the subject of further amendments until such time as the Chair places the rule on the Commission's agenda for consideration of transmission to the Board of Governors Committee on Regulation, Admissions and Discipline with a request that the Board Committee authorize a public comment distribution of the proposed new rule. (Note: At its October 8, 2004 meeting, the Commission voted to adopt, for purposes of drafting, the numbering and organization system of the ABA Model Rules of Professional Conduct. However, the decision to adopt the Model Rules numbering system should not be taken to mean that the substance of the rules or even the organization within any given rule will be identical to a Model Rule counterpart.)

This document provides the following resources: (1) the text of proposed new rule 7.3; (2) a redline/strikeout version of the proposed rule comparing it to Model Rule 7.3; (3) explanatory notes; (4) concepts considered but not recommended; and (5) excerpts from the Commission's May 7 & 8, 2004, July 9, 2004, and August 27 & 28, 2004 meeting summaries.

Proposed New Rule 7.3 (Formerly Rule 1-400) – Clean Version

(As approved at the Commission's October 8, 2004 meeting.)

Rule 7.3. Direct Contact with Prospective Clients

- (a) A lawyer shall not by in person, telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California or the person contacted:
 - (1) is a lawyer; or
 - (2) has a family, close personal, or prior professional relationship with the lawyer.
- (b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
 - (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
 - (2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct; or
 - (3) the person to whom the solicitation is directed is known to the lawyer to be represented by counsel in a matter which is a subject of the communication.

- (c) Every written or, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.
- (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] There is a potential for abuse inherent in direct in person, telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over reaching.

[2] This potential for abuse inherent in direct in person, telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services.

[3] The use of general advertising and written or electronic communications to transmit information from a lawyer to prospective clients, rather than direct in person, telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1.

[4] There is far less likelihood that abuse will occur when the person contacted is a lawyer, a former client, or one with whom the lawyer has a prior close personal or family relationship, or in situations in which the lawyer is not motivated by pecuniary gain. Consequently, the general prohibition in paragraph(a) and the requirements of paragraph(c) are not applicable in those situations.

[5] Even permitted forms of solicitation can be abused. Thus, any solicitation which [1] contains information which is false or misleading within the meaning of Rule 7.1, [2] is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct within the meaning of subparagraph (b)(2), [3] involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of subparagraph (b)(1), or [4] is directed to a person whom the lawyer knows is represented by counsel in a matter which is a subject of the communication within the meaning of subparagraph (b)(3) is prohibited.

[6] Rule 7.3 is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a *bona fide* group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer.

[7] The requirement in paragraph (c) that certain communications be marked "Advertising Material" or with words of similar import does not apply to communications sent in response to requests of potential clients or their representatives. Paragraph (c) is also not intended to apply to general announcements by lawyers, including but not limited to changes in personnel or office location, nor does it apply where it is apparent from the context that the communication is an advertisement.

[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See also Rules 5.4 and 8.4(a).

Proposed New Rule 7.3 Comparison to ABA Model Rule 7.3

(Underlined text is proposed addition; strike-through text is proposed deletion.)

Rule 7.3⁺: Direct Contact with Prospective Clients

- (a) A lawyer shall not by in person ~~or, live~~ telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California or the person contacted:
- (1) is a lawyer; or
 - (2) has a family, close personal, or prior professional relationship with the lawyer.
- (b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
- (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
 - (2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress ~~or harassment,~~ compulsion, intimidation, threats, or vexatious or harassing conduct; or
 - (3) the person to whom the solicitation is directed is known to the lawyer to be represented by counsel in a matter which is a subject of the communication.
- (c) Every written or, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words ~~"Advertising Material"~~ "Advertising Material" or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.

- (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] There is a potential for abuse inherent in direct in person~~-or,~~ ~~live~~ telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over reaching.

[2] This potential for abuse inherent in direct in person~~-or,~~ ~~live~~ telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written ~~and recorded~~ communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. ~~Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.~~

[3] The use of general advertising and written, ~~recorded~~ or electronic communications to transmit information from a lawyer to prospective clients, rather than direct in person, ~~live~~ telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. ~~The contents of direct in person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.~~

[4] There is far less likelihood that abuse will occur when the person contacted is a lawyer ~~would engage in abusive practices against an individual who is~~, a former client, or one with whom the lawyer has a prior close personal or family relationship, or in situations in which the lawyer is not motivated by ~~considerations other than the lawyer's~~ pecuniary gain. ~~Nor is there a serious potential for abuse when the person contacted is a lawyer.~~ Consequently, the general prohibition in Rule 7.3 paragraph(a) and the requirements of Rule 7.3 paragraph(c) are not applicable in those situations. ~~Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.~~

[5] ~~But e~~Even permitted forms of solicitation can be abused. Thus, any solicitation which [1] contains information which is false or misleading within the meaning of Rule 7.1, [2] is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or ~~harassment~~harassing conduct within the meaning of Rule 7.3 subparagraph (b)(2), ~~or which~~[3] involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) subparagraph (b)(1), or [4] is directed to a person whom the lawyer knows is represented by counsel in a matter which is a subject of the communication within the meaning of subparagraph (b)(3) is prohibited. ~~Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).~~

[6] Rule 7.3 ~~This Rule~~ is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a bona fide group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. ~~This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.~~

[7] The requirement in ~~Rule 7.3~~paragraph (c) that certain communications be marked ~~"Advertising Material"~~"Advertising Material" or with words of similar import does not apply to communications sent in response to requests of potential clients or their ~~spokespersons or sponsors~~representatives. Paragraph (c) is also not intended to apply to general announcements by lawyers, including but not limited to changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule nor does it apply where it is apparent from the context that the communication is an advertisement.

[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See also Rules 5.4 and 8.4(a).

Explanatory Notes

Introductory Note:

At present, the marketing of legal services by lawyers is regulated in California through California Rule of Professional Conduct 1-400 and certain sections of the Business & Professions Code. (E.g., Bus. & Prof. Code, sections 6155, 6157 to 6159.2.) At its February 20, 2004 Meeting, however, the Commission voted to explore the possibility of adopting the framework, if not the entire substantive content and language, of the ABA Model Rules of Professional Conduct, Chapter 7, which takes a multi-rule approach to regulating the marketing of legal services. During the discussion leading to that vote, members of the Commission noted that the advertising of legal services and the solicitation of prospective clients is an area of lawyer regulation where national uniformity would be helpful to the courts, the public and practicing lawyers, particularly in light of the current widespread use of the Internet by lawyers and law firms to market their services and the trend in many states toward allowing some form of multijurisdictional practice. Accordingly, after consideration of several drafts of proposed rules that used the Model Rules as templates, the Commission has approved tentative draft rules 7.1 to 7.5. In some instances, however, the Commission made substantive revisions and additions to the language of the Model Rules, which was generally intended to bring the rules in line with current California rules and statutes concerning the marketing of legal services.

Rule 7.1 sets out the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services. Rule 7.2 specifically addresses advertising, a subset of communication. Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client. Rule 7.4 sets out basic rules governing the communication of a lawyer's fields of practice and claims to specialization. Rule 7.5 does the same for the use of firm names and letterheads. The Commission, however, declined to recommend any rule analogous to Model Rule 7.6, which is intended to regulate political contributions made by lawyers to obtain legal work with government entities or to achieve an appointment as a judge.

Title:

The rule title chosen for this new rule reflects the fact that the format and content of the rule has drawn upon Model Rule 7.3 (entitled "Direct Contact with Prospective Clients") Whereas former rule 1-400 addressed communications, advertising and solicitation in a single rule, the Model Rules address these different concepts in separate rules. Rule 7.3 addresses direct communications with a specific, targeted individual or group of individuals. Advertising, which generally involves communications with the general public, is addressed in Rule 7.2. Rule 7.1 contains the general prohibition on false or misleading communications. See above.

Text:

1. Paragraph (a) tracks the language of paragraph (a) of Model Rule 7.3 in prohibiting in-person, telephone or real-time electronic contact to solicit fee-paying employment from a prospective client, except that it prohibits all telephone contact and not just "live telephone" contact. The general concern with real-time lawyer-client contact to solicit employment is that the client, often in a agitated emotional state and confronted by a trained advocate's arguments, does not have sufficient time to reflect on and evaluate all the available alternatives in trying to decide which lawyer to retain. Nevertheless, it was believed that any telephonic contact, whether live or pre-recorded, has the potential to be intrusive and objectionable. For example, an interactive, pre-recorded call has the potential to bring a person in live contact with a lawyer by the touch of single button, without providing the requisite time for reflection. Although such conduct is also prohibited under proposed rule 7.3(b)(2), it was determined that the prohibition on such contact be emphasized. Consequently, the modifier "live" was deleted from paragraph (a).

Paragraph (a) also adds the savings clause, "unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California," language which is currently found in CRPC 1-400(C). It was suggested during Commission deliberations that the United States Supreme Court case, *Edenfield v. Fane* (1993) 507 U.S. 761, has arguably rendered prohibitions such as those found in rule 7.3(a) constitutionally infirm and that the provision should be deleted. However, it was noted that this constitutional issue was one for

the courts, not for the Commission, requiring a prediction of how a reviewing court might interpret the rule. Nevertheless, it was determined that the constitutional issue would be adequately addressed and an “all or nothing” invalidation of the rule avoided by extending and including the savings clause that now appears in current CRPC 1-400(C).

Paragraph (a) also contains the phrase “real-time electronic contact,” which was added by the ABA Ethics 2000 Commission to extend the prohibition on solicitation to electronic communications with prospective clients in real time, for example, communications in Internet chat rooms or by instant messaging. Unlike e-mail, which allows the recipient time for reflection on the available alternatives before making a decision, the interactivity and immediacy of response in real-time electronic communication presents the same dangers as those involved in real-time telephone contact. See ABA Ethics 2000 Reporter’s Explanation of Changes, Model Rule 7.3. The Commission is particularly interested in receiving comments from the public concerning its decision to include “real-time electronic contact” as prohibited conduct in rule 7.3.

Subparagraphs (a)(1) and (a)(2) recognize that the concerns with overreaching by lawyers and lack of time for reflection in real-time communications is not present when the person being contacted is another lawyer, or has a family, close personal or prior professional relationship with the soliciting lawyer. See also comment [4]. Subparagraph (b)(1) would permit in-person contacts with in-house lawyers of organizations but would not permit contact with nonlawyer representatives of such organizations. Subparagraph (b)(2) would permit a lawyer to make an in-person, telephonic or real-time electronic contact with a former client in discharging the lawyer’s professional duties, for example, contacting a former client for whom the lawyer had prepared an estate plan in order to apprise the client of a change in the law that could have an impact on the client’s estate. Compare current CRPC 1-400(C). Subparagraph (b)(2) would also permit a lawyer to call a close personal friend and offer to provide legal services. A “close personal relationship” is not limited to an “intimate personal relationship.” See current CRPC 3-320.

The word “lawyer” has been substituted for the word “member” in rules 7.1 through 7.5 to indicate that the rules are intended to apply not only to members of the State Bar of California but also to other lawyers who may, where permitted by law, advertise their services in California. See, e.g., California Rule of Court 988 [Registered Foreign Legal Consultants] and the State Bar of California Registered Foreign Legal Consultant Rules and Regulations.

2. Paragraph (b) is based on paragraph (b) of Model Rule 7.3, which prohibits any solicitation of professional employment from a prospective client, whether in real-time or not, and whether or not it is prohibited under paragraph (a), if the prospective client who is the target of the communication has made known to the lawyer that he or she does not want to be solicited by the lawyer, (subparagraph (b)(1)), or if the “solicitation involves coercion, duress or harassment,” (subparagraph (b)(2)).

Paragraph (b) is intended to prohibit otherwise permitted forms of solicitation which, under particular circumstances, offer an opportunity for abuse by a lawyer. See comment [5]. The introductory paragraph of paragraph (b) is identical to that of Model Rule 7.3 and identifies the kind of conduct that ordinarily is permitted under rules 7.1, 7.2 or 7.3(a).

Subparagraph (b)(1) is identical to subparagraph (b)(1) of Model Rule 7.3 and prohibits any kind of solicitation when the prospective client has made known to the lawyer a desire not to be solicited by the lawyer.

Subparagraph (b)(2) addresses the same concept as does subparagraph (b)(2) to Model Rule 7.3, overreaching by a lawyer in the manner in which the solicitation is made. Subparagraph (b)(2) uses language that is currently found in CRPC 1-400(D)(5), which was believed to provide a better range of conduct that should be prohibited than does the Model Rule’s language. Subparagraph (b)(2) adds the concept of “intrusion”. Although a concern was raised during Commission deliberations that prohibiting “intrusion” might result in a prospective client losing rights after being contacted by a non-lawyer defense representative (e.g., an insurance adjuster), it was noted that the prohibition against intrusion is important for the protection of privacy rights, and a motion to delete reference to “intrusion” failed.

Subparagraph (b)(3) has no counterpart in Model Rule 7.3. Subparagraph (b)(3), which is currently found in CRPC 1-400(B)(2)(b), complements the prohibition on communicating with a person represented by counsel. See Model Rule 4.2 and current CRPC 2-100.

3. Paragraph (c) is based upon paragraph (c) of Model Rule 7.3. The phrase “or words of similar import” has been added following “Advertising Material.” That phrase is currently found in Standard (5) to CRPC 1-400. It provides lawyers with some flexibility in how they identify marketing materials they send to prospective clients. Regardless of the specific language used, the recipient must be made aware that the communication is an advertisement.

Paragraph (c) also adds the clause: “or unless it is apparent from the context that the communication is an advertisement.” That clause was added to address the contention that it is usually apparent from the communication itself that it is an advertisement.

4. Paragraph (d) is identical to paragraph (d) of Model Rule 7.3. Paragraph (d) permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal services plan, so long as paragraph (d)’s conditions are satisfied. See comment [8].

Comment:

1. Comment [1] is identical to comment [1] to Model Rule 7.3. Comment [1] explains the rationale for prohibitions on solicitations made by lawyers in real-time.
2. The first sentence of comment [2] is nearly identical to comment [2] to Model Rule 7.3, except that “live” as a modifier of telephone contact has been deleted to conform the comment to the language in paragraph (a) of the rule. The second sentence of Model Rule 7.3, cmt. [2], with its reference to “autodialed” communications has also been deleted for the same reason. See Explanatory Notes, Text, No. 1, *above*.
3. Comment [3] is based upon comment [3] to Model Rule 7.3. The reference to “recorded” and “live” in the first sentence has been deleted to conform the comment to the language in paragraph (a) of the rule. The last two sentences of Model Rule 7.3, cmt. [3], have been deleted as surplusage.
4. Comment [4] is based upon comment [4] to Model Rule 7.3. Comment [4] elaborates upon subparagraphs (a)(1) and (a)(2), which recognize that the concerns with overreaching by lawyers and lack of time for reflection in real-time communications is not present when the person being contacted is another lawyer or has a family, close personal or prior professional relationship with the soliciting lawyer. The modifications to the first sentence of Model Rule 7.3, cmt. [4] are stylistic in nature. No change in substance was intended. The last sentence of Model Rule 7.3, cmt. [4], has been deleted as surplusage.
5. Comment [5] is based upon comment [5] to Model Rule 7.3. Comment [5] elaborates upon subparagraphs (b)(1)-(3), which prohibit otherwise permitted forms of solicitation which, under the particular circumstances identified, offer an opportunity for abuse by a lawyer. Changes from Model Rule 7.3, cmt. [5] are intended to conform the comment to the language in subparagraphs (b)(2) and (b)(3). The last sentence of Model Rule 7.3, cmt. [5], has been deleted as surplusage.
6. The first sentence of comment [6] is identical to comment [6] to Model Rule 7.3, except that “Rule 7.3” has been substituted for “This Rule,” and the phrase “*bona fide*” has been included to modify “group or prepaid legal plan.” The remainder of rule Model Rule 7.3, cmt. [6] has been deleted as surplusage.
7. Comment [7] is based upon comment [7] to Model Rule 7.3. Changes have been made to conform the comment to the revisions made to paragraph (c). Comment [7] notes that paragraph (c) does not apply to replies by the lawyer to inquiries from prospective clients, nor to general announcements such as changes in personnel or office location.
8. Comment [8] is identical to comment [8] to Model Rule 7.3, which elaborates upon paragraph (d).

Concepts Considered but Rejected or Postponed for Future Consideration:

1. At its July 9, 2004 meeting, the Commission considered whether to delete paragraph (a) of rule 7.3 on the grounds that it is unconstitutional in light of the United States Supreme Court's decision in *Edenfield v. Fane* (1993) 507 U.S. 761. After deliberation, a motion to delete paragraph (a) failed. See Explanatory Notes, Text, No. 1, *above*. See *also* July 9, 2004 Meeting Summary excerpt, *below*.
2. At its July 9, 2004 meeting, the Commission considered whether to include a definition of "solicitation" in rule 7.3, as currently appears in CRPC 1-400 (B). After deliberation, in which it was observed that there was no need to for a separate definition as the subject of the prohibited conduct is sufficiently described in the rule, a motion not to include the definition passed.
3. An State Bar member who is not a member of the Commission suggested that the Commission consider a provision establishing a "cooling off" period after the occurrence of an event that gives rise to a need for legal services before a lawyer or a representative of the lawyer could communicate with a prospective client by targeted mail. See, e.g., *Fla. Bar v. Went for It, Inc.* (1995) 515 U.S. 618. The Commission declined to recommend adoption of such a rule.

Excerpt from the Commission's May 7-8, 2004 Meeting Summary

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A. Consideration of Rule 1-400. Advertising and Solicitation

The Commission considered a March 25, 2004 e-mail message from Mr. Mohr attaching a proposal for draft rules 7.0 through 7.6. The Commission referred to Mr. Mohr's explanatory endnotes in discussing the proposed rules. For the next redraft, there was consensus on the following points.

* * *

Among the points raised during the discussion were the following.

1. RPC 1-400(D) includes a prohibition against intrusive conduct that needs to be covered.
2. Intrusive conduct can be covered in proposed rule 7.3 as the this type of conduct likely is a "direct contact" issue.

Excerpt from the Commission's July 9, 2004 Meeting Summary

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A. Consideration of Rule 1-400. Advertising and Solicitation

The Commission considered a May 29, 2004 e-mail message from Mr. Mohr presenting Draft 2 (5/28/04) of proposed advertising and solicitation rules patterned after MR 7.1 to 7.6. Following discussion, the Commission made various drafting decisions that are summarized below. For the next meeting, the co-drafters were asked to: (1) implement the drafting decisions discussed; (2) develop proposed discussion sections; and (3) provide a recommendation as to the handling of the RPC 1-400(E) advertising standards.

* * *

Next discussed was proposed rule 7.3. A problem of constitutionality was brought up in an email by Samuel Bufford. Mr. Bufford asserts that 7.3(a) and (b) are unconstitutional. Among the points raised during this discussion were the following:

- (1) This proposed rule is constitutionally vulnerable and the Commission should rethink it. *Edenfield v. Fane* (1993) 507 US 761 is a good forecast of what will happen to the rule if it is applied to the solicitation of business from a sophisticated client.
- (2) There is nothing wrong with a lawyer approaching an in-house counsel of a corporation.
- (3) It is up to the high courts to decide an issue of constitutionality. This is a potentially endless debate that cannot be resolved by the Commission because it requires a prediction of how a reviewing court might interpret the rule in a particular set of facts.
- (4) The potential for a constitutionality issue would be adequately addressed by incorporating and extending the savings/severability clause in current RPC 1-400(B).

A motion was made to delete proposed rule 7.3(a) and failed with a vote of 2 yes, 7 no, and 1 abstention.

A question was raised as to whether a definition of solicitation should be included in the rule. It was observed that there is no need for a separate definition of "solicitation" as the subject of prohibited conduct is sufficiently described in the paragraphs of the rule. A motion was made to not include a definition of solicitation. The motion passed with a vote of 7 yes, 0 no, and 3 abstentions.

Next discussed was the phrase "live telephone" as used in proposed rule 7.3(a). While no live telephone solicitation would be permitted under the proposed rule, the question arose as to whether any type of telephone contact would be allowed. An example of non-live telephone contact would be a pre-recorded phone message. Among the points raised during this discussion were the following:

- (1) Live is correlative to "real time."
- (2) The concern is that when making the decision to get legal representation, the potential client has time to reflect when it is non-live (such as inter-active recorded) as opposed to live.

A motion was made to delete "live" from the rule. The motion carried with a vote of 5 yes, 2 no, 0 abstentions. Mr. Mohr volunteered to draft discussion section language that distinguishes live telephonic contact from pre-recorded message contact.

A motion was made to delete the words "the member's" from the third sentence of proposed rule 7.3(a). An argument was made that the phrase is repetitive and does not add to the rule. The motion failed with a vote of 3 yes, 4 no, and 2 abstentions.

Included in the proposed rule was bracketed language stating: "the communication is protected from abridgment by the Constitution of the United States or by the constitution of the State of California or. . . ." The Commission discussed the continued inclusion of this language.

- (1) The language adds nothing to the rule. It should not be included.
- (2) If the language is left in, then we do not need to address the constitutionality issue.
- (3) This language avoids the "all or nothing" invalidation of the rule.

A motion was made to include this language as part of the rule. The motion carried with a Commission vote of 6 yes, 1 no, and 1 abstention.

Next discussed was the phrase "real time electronic contact" as used in proposed rule 7.3(b). The Commission observed that real time electronic contact is similar to instant messaging while the opposite would be a message board. A motion was made to include the proposed phrase in the rule and to highlight it for public comment. The motion passed with a vote of 6 yes, 1 no, and 1 abstention.

An issue concerning the word "intrusion" in proposed rule 7.3(b)(2) was raised. It was observed that a blanket prohibition against intrusion is important for protection of privacy rights and should be kept in the rule. Among the points raised during this discussion were the following:

- (1) The rule is intended to protect the public from other people's improprieties.
- (2) The idea of giving people privacy from lawyers is, itself, an injustice because it favors defense and insurance adjuster interests.
- (3) The client who has not been advised by a lawyer promptly likely will lose many rights. This particular word is not needed here and could be considered anti-consumer.

A motion was made to delete the word "intrusion" from the proposed rule. The motion failed with a vote of 2 yes, 5 no, and 2 abstentions.

A motion was made to add the phrase "words of similar import" to the end of 7.3 (c). The motion passed with a vote of 7 yes, 0 no, and 3 abstentions.

Next discussed was the phrase "unless it is apparent from the context that the communication is an advertisement" as used in proposed rule 7.3(c). Among the points raised during this discussion were the following:

- (1) This basic requirement, itself, is simply stated. The proposed added nuance is not necessary and just adds extra words.
- (2) Sometimes it is not apparent that the ad is an advertisement, especially with longer commercials.
- (3) As this language is being essentially moved from existing RPC 1-400(E), standard no. 5, the concept of a rebuttable presumption is no longer present. By deleting this language, an existing affirmative defense would be eliminated.

A motion was made to strike this phrase from the proposed rule. The motion failed with a vote of 2 yes, 8 no, and 0 abstentions.

Excerpt from the Commission's August 27-28, 2004 Meeting Summary

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A. Consideration of Rule 1-400. Advertising and Solicitation

The Commission considered a Draft No. 3 of proposed amended advertising and solicitation rules patterned on the comparable Model Rules. The Commission also considered recommendations on the existing advertising standards adopted by the Board of Governors pursuant to RPC 1-400(E). Mr. Mohr presented the background of the current drafts.

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Next, the Commission turned to the proposed rule 7.3. The Chair deemed approved the codrafter recommendations at notes 37, 38, 39 and 40 appended to Draft 3. Mr. Melchior and Mr. Sapiro expressed concerns with language included pursuant to note 37 (re proposed rule 7.3 Disc. [1]). Mr. Sapiro also expressed concern about the language included pursuant to note 40 (re proposed rule 7.3 Disc. [4]) and suggested deletion. No other Commission members joined Mr. Melchior or Mr. Sapiro in questioning these codrafter recommendations.

Regarding proposed rule 7.3 Disc. [5], by consensus the Commission agreed to include this language.

Regarding proposed rule 7.3 Disc. [6], by consensus the Commission agreed to include this language to be modified by the codrafters to insert the qualifier "bona fide" in describing a "group or prepaid legal plan. . . ."

Regarding proposed rule 7.3 Disc. [7], the Commission considered a motion to modify it to replace the phrase “spokespersons or sponsors” with the word “representatives.” The motion passed by a vote of 5 yes, 0 no, 4 abstain. The Commission also considered a motion to add the phrase “including but not limited to” so that the paragraph reads: “. . . general announcements by members, including but not limited to changes in personnel or office location. . . .” This motion passed by a vote of 5 yes, 0 no, 4 abstain.

Regarding proposed rule 7.3 Disc. [8], by consensus the Commission agreed to include this language.

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General information about the Commission, including: its charter; meeting schedule; and a member-staff roster is available at the State Bar of California website. Go to: www.calbar.ca.gov/ethics and access the link to the “Commission for the Revision of the Rules of Professional Conduct.”